

JUDGE'S COPY

copy

From The Desk of:
MR. John Richard Doe,
#BQ-3019
Sci-Greene/amu
175 Progress Drive
Waynesburg, PA 15370-8089
September 17, 2001

TO: Office of the Clerk,
U.S. District Court
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17108-0983

1708
ORIGINAL

RECEIVED
HARRISBURG, PA

SEP 21 2001

MARY E. DIANDREA, CLERK
Per STB

Re: The vs. Drago Vich, et al.
CIVIL No. 1: CV-00-2123 J Rambo

Dear Clerk:

Please file the Enclosed Plaintiff's written objections to
U.S. Magistrate Judge's Report and Recommendation of July 11, 2001, Her
in the above-captioned CIVIL Rights Case and forward such to U.S.
District Judge Rambo.

cc: MR. Michael L. Harvey, SDAS,
w/encl.

Sincerely,
(s) John Richard Doe
MR. JOHN RICHARD DOE
Plaintiff and Pro Se Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAG
Plaintiff,

vs.

SUPERINTENDENT DRAGONICH,
OFFICER VALENTINE, OFFICER
ZIMMERMAN, OFFICER TAYLOR,
OFFICER NOLAN, OFFICER NEPANA
OFFICER SWIFT,

Defendants.

CIVIL No. 00-00-
U.S. District Judge R.
Magistrate Judge Smyke

FILED
HARRISBURG, PA

SEP 21 2001

MARY E. D'ANDREA, CLERK
Per Sly Clerk

PLAINTIFF'S WRITTEN OBJECTIONS TO THE U.S. MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION OF JULY 11, 2001, HERETO

Comes now the Plaintiff & his counsel in the above-entitled matter, John Richard Jag, as a Layman who Hereto in the Arts & Sciences of the law, resides within the United States, who, pursuant to Fed. R. Cr. P. 72(b) and Counts M.D.-LR 72.3, now files his Plaintiff's written objections to the Magistrate Judge's Report and Recommendation of July 11, 2001, herein, & why, more or less,

on or about December 7, 2000, the Plaintiff commenced this U.S. 1983 action by filing a complaint. On February 1, 2001, the Plaintiff filed an Answer.

On March 6, 2001, the Defendants filed a motion to Dismiss the Complaint. On 20, 2001, Defendants filed their Brief in Support of Defendants' Motion.

On May 25, 2001, Plaintiff filed his Brief in Opposition to Defendants' Motion to Dismiss the Complaint and Brief in Support.

On July 11, 2001, the U.S. Magistrate Judge filed his Report and Recommendation, thus recommending that the defendants' motion to dismiss be granted, that the plaintiff's claims be dismissed without prejudice based on plaintiff's failure to exhaust available administrative remedies.

On July 22, 2001, Plaintiff filed his Retention For Writ of Habeas Corpus Brief in Support.

On August 21, 2001, U.S. District Judge Sylvia H. Ramo, legally dated

And granted Plaintiff's Petition For Reconsideration of this Court's August 15, 2000, Order and ordered that Plaintiff's granted to September 17, 2000, to file objections to report and Recommendation of the magistrate judge.

Plaintiff now complies with such August 31, 2000, Order and undisturbed now files his written Objections to the U.S. Magistrate Judge's Report and Recommendation of July 11, 2000, Herewith.

The U.S. Magistrate Judge, states & holds:

In the instant case, the plaintiff asserts that he filed a grievance concerning the claims in this case but that the grievance coordinator returned the grievance unprocessed. It appears from the Plaintiff's brief that the grievance was returned because it contained numerous issues in violation of DC-ADM 804 VI (A) (5), which provides that grievances based on different events should be presented separately unless it is necessary to combine the issues to support the claim.

The plaintiff should have either appealed the return of his grievance or submitted another corrected grievance."

Plaintiff ~~specifically~~ specifically & strongly objects to the above-holds the U.S. Magistrate Judge & avers & submits that, in the first place, such is simply incorrect and untrue, in that, in his Brief In Opposition To Defendant's Dismissal Of The Complaint And Brief In Support, this Plaintiff does not anywhere therein that the grievance was returned because it contained issues in violation of DC-ADM. #804 VI. A. 5., what Plaintiff does state in his is that the Grievance coordinator violated DC-ADM. #804 VI. and DC-ADM. A. 5. of July 29, 1994, when he rejected this Plaintiff's Grievance of September because under DC-ADM. #804 VI. A. 5. of July 20, 1994, this Plaintiff was permitted grievance based on different events, when it was necessary to combine the issues to support the claim, as was the case, herewith with this Plaintiff's September 27, Grievance. In his September 27, 2000, Grievance, this Plaintiff alleges RHU Lieutenants Rhoades & Porterfield & the RHU officers on all three shifts, once again violating his 1st, 8th & 14th Amendments, U.S. Constitutional Rights by refusing to let him write mail on 9/20/00, & opened & read such mail & then returned such to him on 9/22/00, RHU Lt. Porterfield illegally had my Globe Newspaper confiscated & that, the steal and/or delay his other incoming mail - that, for the past two weeks since a

1/ See the U.S. Magistrate Judge's 7-11-00, Report And Recommendation, at 9.

the RHU officers have been opening all the windows in the RHU whenever inmates get noisy & it's cold out & I have to suffer & freeze, that, 9/23/00, he was illegally denied his library book because other inmates were noisy & caused the faithful of B/I to be burnt for library books & he's guilty that, on 9/24/00, RHU Lt. Rhoades illegally denied him a clean jump suit & bed linen although other RHU inmates get such & that, on 9/24/00, Lt. Rhoades threatened to assault him, and ~~it~~ it was necessary for him to combine these issues/facts in his 9/27/00, Grievance to support his claim that RHU Lieutenants Rhoades & Renterfield & the RHU officers on a three shifts were once again violating his 1st, 8th & 14th Amendment U.S. Constitutional Rights & also because back there then RHU officers would provide him with/give him a grievance form whenever they passed out paperwork for once a week on Thursday and they would only provide/give him one (1) grievance then and that the above statement/holding of the U.S. Magistrate Judge ignores such facts and also ignores the fact that it was the grievance coordinator (not plaintiff) who illegally violated DC-ADM #804-IV, and DC-ADM #804-VI-A, 5, by improperly rejecting plaintiff's September 27, 2000, Grievance, thereby rendering the remedies available under DC-ADM #804 unavailable to this Plaintiff and, second of all, there's nothing at all period in the DC-ADM #804 which permits an inmate to appeal the Grievance Coordinator's rejection of his grievance to the Superintendent, and therefore this Plaintiff could not have appealed rejection/return of his September 27, 2000, Grievance to the Superintendent back then and Magistrate Judge is holding on this.

The U.S. Magistrate Judge states & holds that:

--- there is nothing in DC-ADM 804 that indicates that the return of the plaintiff's grievance as not complying with DC-ADM 804 section (A) (5) would not be considered a written response to the plaintiff's initial grievance satisfying the initial review process. The Plaintiff should have attempted to administratively appeal the initial rejection of his grievance.

The Plaintiff specifically & strongly objects to the above statement/holding of the Magistrate Judge & avers & submits, that, DC-ADM #804-VI-B, 4, of July 1999,

"Within ten (10) working days of receipt of the grievance by the grievance officer, the grievant shall be provided a written response to the grievance to include a brief rationale summarizing the conclusions

and any action taken or recommended to resolve the issues raised in the grievance.

and therefore, the initial review decision on a grievance as contemplated the very wording of DC-ADM #804. VI. B. 4, of July 20, 1994, is one which includes a brief rationale summarizing the conclusions and any action taken recommended to resolve the issues raised in the grievance, i.e., a decision on the merits of the facts/issues raised in the grievance and, given the grievance coordinator's rejection and return of a grievance to the plaintiff without referring such to the grievance officer for investigation, a written decision to include a brief rationale summarizing the conclusions and any action taken or recommended to resolve the issues raised in the grievance is not a proper written response to the plaintiff's grievance satisfying the initial review procedures and thus enabling him to appeal such to the Superintendent under DC-ADM #804. VI. C. 2, and such, the above statement/holding of the U.S. Magistrate Judge herein, clearly and plainly wrong and incorrect and defies common sense. Again, this plaintiff did not appeal the Grievance Coordinator's rejection/September 27, 2000, Grievance, because by & under the R. Doc DC-ADM #804, July 20, 1994, he was not permitted to do so.

Finally, the U.S. Magistrate Judge, states & holds =
 Since the plaintiff could have and still can seek an extension of time to file his grievance, the plaintiff has not exhausted available administrative remedies. See Harper v. Jenkins, 199 F.3d 1311, 1312 (11th Cir. 1999) ("since appellant has not sought leave to file an out-of-time grievance he cannot be considered to have exhausted his administrative remedies.")

The Plaintiff specifically & strongly objects to the above statement/holding of Magistrate Judge's and avers and submits that, as he stated and argued in his Brief in Opposition to the Defendants' Motion to Dismiss The Complaint at 10-13p - - - - the Grievance Coordinator violated DC-ADM #804. IV. and DC-ADM #804. VI. A. 5, of July 20, 1994, when he rejected this Plaintiff's Grievance of September 27, 2000, under DC-ADM #804. VI. A. 5, of July 20, 1994, this Plaintiff was permitted to file a grievance based on different events, when it was necessary to combine the support the claim, as was the case herein, with this plaintiff's September 27, 2000, Grievance. Furthermore, by improperly rejecting this plaintiff's properly September 27, 2000, Grievance, the Grievance Coordinator rendered

September 27, 2000, Grievance, the Grievance Coordinator rendered administrative remedies under DC-ADM #804, of July 20, 1994, unavailable to this inmate-plaintiff and he could "not" exhaust such. Plaintiff only has to exhaust the prison's administrative remedies which are available to him. See Camp v. Brennan, 219 F.3d 279 (3d Cir. 2000), and there was no available remedies here in for him to exhaust, as when attempted to comply and exhaust his available administrative remedies under DC-ADM #804, by filing a grievance the HPI Grievance Coordinator illegally violated DC-ADM #804, & refused to allow this Plaintiff to do so, thereby rendering administrative remedies under DC-ADM #804, unavailable to this Plaintiff, thru no fault of this Plaintiff.

Furthermore, although this Plaintiff could not & did not feel improperly rejected September 27, 2000, Grievance, he had and complained to Defendant Superintendent Dragovich & Secretary of Corrections Martin Horn, on September 25, 2000, the same incident(s) for which he filed suit for herein this in and thus he has presented the incident and the facts, such in the complaint, herein this case, to Prison Officers (Defendant Superintendent Dragovich and also to the Secretary of Corrections for the Pennsylvania Department of Corrections) and given these prison officials the same fair opportunity to address & correct the problems/violations complained about in the complaint, herein this case, that they would have had available to file a grievance and exhaust his administrative remedies to such under DC-ADM #804, & thus he has "not" failed to exhaust administrative remedies, herein, or, if he is deemed by the court to have failed to exhaust such available administrative remedies.

Since Plaintiff is not in a position to Defendant in this case, the complaint is supported by the following exhibits - B, attached hereto, the 925-01 letter to Defendant's

than he "has" shown excusable reasons for such ~~that~~ remedies "were" rendered unavailable ^{to} him through no fault of own and due to circumstances beyond his control, as described, herein, supra, at 7-9, and thus he should "not" unfairly and unjustly penalized by having his complaint and this case dismissed for failure to exhaust administrative remedies under DC-ADM. #804, of July 20, 1994 and 42 U.S.C. 1997e(a) should "not" be deemed held to bar this Inmate Civil Rights

Although he may be wrong, this Plaintiff believes ~~that~~ avers & submits that, if this Court grants the Defendant's Motion to Dismiss & dismisses this Plaintiff's complaint, herein this Court's dismissal is without prejudice and thus Plaintiff could refile his complaint after he had exhausted his administrative remedies under DC-ADM. #804, however, because this Plaintiff now has no remedies available, due to the facts that it is way beyond the 15 days time period to file such grievance, he would be exhausting his administrative remedies under 42 U.S.C. 1997e(a) and because he is now no longer up at SCI-Camp Hill, it would be futile for this Court to dismiss the complaint for failure to exhaust administrative remedies, without prejudice, and order this Plaintiff to go back and exhaust his available prison administrative remedies and then refile his complaint once he has exhausted such remedies. This Plaintiff could "not" do so, as he has no administrative remedies available to exhaust under DC-ADM. #804. 10/ The U.S. District Judge's Report and Recommendation of July 11, 2001, herein this Plaintiff ignores and fails to even address ~~nor~~ even mention such Plaintiff's arguments of his ~~ref~~ as above-referenced and such failure to do so.

Furthermore, Plaintiff avers & submits that, of significant importance, Plaintiff's brief in opposition to Defendant's Motion to Dismiss the Complaint

is the fact that neither in their Brief in support of Motion To Dismiss nor in their Reply Brief in support of Motion To Dismiss, herein this case, do the Defendants claim or argue that the Plaintiff can at this late of date resubmit Grievance and exhaust his administrative remedies under DC-ADM #804, nor that such administrative remedies are even still available to this here Plaintiff and that goes even to show that the U.S. Magistrate Judge "is" wrong as to such.

Further proof that the U.S. Magistrate Judge "is" wrong when he states that the plaintiff can still seek an extension of time to file his Grievance, is garnered from the facts that August 1, 2001, this Plaintiff wrote and sent to Defendant Superintendent Dragovich at SCI-Camp Hill, a letter, dated 31, 2001, requesting, in writing therein, that he grant this Plaintiff permission to file an out-of-time Grievance to the fact alleged in the Complaint and the Amended Complaint in this here instant case, given the decision of the U.S. Magistrate Judge in his July 11, 2001, Report And Recommendation at 10-11, this case, and ^{given the wording of DC-ADM #804-42 and} that as of the date of the ^{here} ~~the~~ ^{here} written objections, Defendant Superintendent Dragovich has ~~not~~ ^{not} replied back to this Plaintiff on his July 31, 2001, Letter obviously if Defendant Superintendent Dragovich intended to grant Plaintiff permission to file his out-of-time Grievance, he would have responded back here to this inmate-Plaintiff told him so, as more than forty (40) days have now elapsed since this Plaintiff mailed/sent Defendant Superintendent his July 31, 2001, letter requesting such.

In Camp v. Brennan, 219 F.3d 279 (3d Cir. 2000), which was decided by the Third Circuit, on July 18, 2000, several months after the Plaintiff's July 31, 2001, Letter to Defendant Superintendent Dragovich, see this Plaintiff's July 31, 2001, Letter to Defendant Superintendent Dragovich, Exhibit C - Attached to Plaintiff's Exhibit 1 - C. Since Plaintiff's letter was not received by

Third Circuit's decision in Booth v. Churner, 206 F.3d 288 (3d Cir. 2000), the U.S. Court of Appeals for the Third Circuit, stated that

But we find Camp's second position persuasive. It will be recalled that (understandably enough under Section 1997e(a)) the prisoner need only exhaust such administrative remedies "as are available." (Camp, 219 F.3d at 287).

Herein this instant case, given what this Plaintiff has stated & argued, herein, supra, Camp v. Brennan and not Booth v. Churner, supra, is controlling and, under Camp, this Plaintiff's complaint and this case should "not" be dismissed.


Finally, the case, Harper v. Jenkins, 179 F.3d 1311, 1312 (11th Cir. 1999), which the U.S. Magistrate Judge cited in his July 11, 2001 Report And Recommendation, at 11, is "not" of this Third Circuit and such, is "not" legally binding upon this Court and to the extent such case is even applicable herein this instant case, Plaintiff has complied with such.

Therefore, given the above & foregoing facts, arguments, citations of authorities, herein, supra, the U.S. Magistrate Judge's Report And Recommendation of July 11, 2001, herein, infra, come to the controlling Federal Law, under Camp v. Brennan, 219 F.3d 287 (3d Cir. 2000) and the U.S. Magistrate Judge has acted in his discretion and authority by issuing such and therefore, the motion to dismiss the complaint, must, by law, be denied. Case remanded back to the U.S. Magistrate Judge for further proceedings to be held, herein.

Alternatively, should this Court affirm & adopt the Report And Recommendation of the U.S. Magistrate Judge, and, dismiss Plaintiff's claims without prejudice, herein, Plaintiff requests the U.S. District Judge Order Defendant Superintendent Dragon to file a complaint in compliance of

and that such shall be processed, in full, within the time limits set forth therein DC-ADM. #804, so long as this Plaintiff mails the Grievance to the Grievance Coordinator at SCI-Camp Hill within 15 working days of the date of the Court's order and that the Postmark on the envelope shall be the controlling date as to when such was timely mailed/submitted and that once the Plaintiff has fully exhausted his available administrative remedies under DC-ADM. #804, he shall be permitted to file his 42 U.S.C. § 1983 CIVIL RIGHTS ACTION/COMPLAINT with the Court and to proceed *in forma pauperis*:

RESPECTFULLY SUBMITTED

(S) 
 MR. JOHN RICHARD JAE,
 #BQ-3219
 SCI-Greene/AMU
 175 Progress Drive
 Waynesburg, PA-15370-8089

Dated: 16th SEPTEMBER 2001

Plaintiff and *Pro Se* Counsel

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. BOX 598
CAMP HILL, PA 17001-0598

GRIEVANCE NO.

GOLDENROD—Inmate Copy

105 SUPERINTENDENT
SCE CAMP H11

SEP 26 2000

| | | | |
|-------------|------------------------------|-------------|----------|
| DC Number | Name | Institution | Referred |
| Pen BQ 3219 | Jae, John R. (RH/D-B06-Cell) | SCE | |

Superintendent Dragovich, Sir Pleasently
I am getting sick & tired of getting bullied by your officers for things I have a right to. I have a library book to read & being made to suffer by your officers opening up & refusing to close the windows in the RHU because of a few nigger inmates. I want to run their can mouths & shut up the RHU & say nothing and yet I am illegally denied a library book because your officers burn the whole entire front hall for the same reason. I will open up all the windows on RHU B1 thru B10 when it is really cold outside as it has been the last several days & leave such open, and then I see this you can order the RHU officers here to touch the RHU windows unless an RHU inmate orders them to open & close the window directly in front of their cell & then they must do so, or in the alternative, I sue your RHU officers for \$25,000.00 compensation & \$25,000.00 punitive damages in court for cruel & unusual punishment and deliberate indifference to my physical well being/health and also I sue you, Sir, for conspiracy along with your officers. Also on 9/20/00 at my 30-day PRC Review where Deputy Superintendent Dragovich ordered that I be given my legal & religious materials on a 1st paper that I gave to the PRC here then on the same date, however, RHU Property Officer Ruben Palatovich has deliberately & maliciously failed to comply with Dragovich's orders and give me such legal & religious materials here & on Thursday, September 21, 2000 he brought that loud-mouthed nigger in B104 Cell his legal materials because he said he had court pleadings due on 9/29/00 and I had court pleadings due on 9/25/00. And on 9/24/00 RHU Lt. Rhoades deliberately & maliciously given me a 1st RHU jumpsuit & towel & bed linen & bath all the inmates of such things here & such exchange is mandatory.

FROM: MR. John R. Jee,
#BQ-3219
Sgt - Greene/Am V
175 Progress Drive
Waynesburg, PA 15370-8039
July 31, 2001

TO: Superintendent Martin L. Dagonich,
Sgt - Camp Hill
P.O. 8837
Camp Hill, PA 17001-8837

Re: "Request to File Grievance Out-of-Time"

Dear Superintendent Dagonich, Sir:

In light of & given the U.S. Magistrate Judge
Report And Recommendation of July 11, 2001, in Jee vs. Dagonich
Civil No. 1-CK-00-2123 and the writing of DC-ADM #804
of May 1, 1998, I am now writing & sending you this letter
to request in writing hereto that you would permit me to
re-submit/file the attached Grievance out-of-time and that
such be processed in full, as though such was timely.

I request that you, Sir, would reply back to
me at my above-listed address & advise me therein
writing as to whether you will or will not permit me to
re-submit/file the attached Grievance out-of-time and thank
you very much for your time & consideration in this matter.

Sincerely,

(s) John Richard Jee
MR. JOHN RICHARD JEE
Plaintiff and ASSE. COUN.

Plaintiff's Exhibit - C - 1 -

DC-804
Part 1COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. BOX 598
CAMP HILL, PA 17001-0598

FOR OFFICIAL USE ONLY

GRIEVANCE NUMBER

OFFICIAL INMATE GRIEVANCE

| | | |
|--|--|-------------------------|
| TO: FACILITY GRIEVANCE COORDINATOR <i>MR. Ben C. Livingston</i> | FACILITY: <i>SCI-Camp Hill</i> | DATE: <i>7-31-01</i> |
| FROM: (INMATE NAME & NUMBER) <i>MR. John R. Joe, BR-3211</i> | SIGNATURE of INMATE: <i>(S) John R. Joe</i> | |
| WORK ASSIGNMENT: <i>None</i> | HOUSING ASSIGNMENT: <i>SCI-Greene/SMU-HB9</i> | |

INSTRUCTIONS:

1. Refer to the DC-ADM 804 for procedures on the inmate grievance system.
2. State your grievance in Block A in a brief and understandable manner.
3. List in Block B the specific actions you have taken to resolve this matter informally. Be sure to include the identity of staff members you have contacted.

A. Provide a brief, clear statement of your grievance. Additional paper may be used, maximum two pages.

From September 12, 2000, - October 2, 2000, RHU officers Valentine and Zimmerman on the 2-10 shift and AM officers Taylor, Nwak, Ney & Swift, on the 10-6 shift would open & then refuse to close the windows in the RHU because of a few inmates talking too loud when it was cold outside and such caused this inmate to have to suffer & be cold & be subjected to extreme changes in temperature because of other inmates which is not fair & such placed this inmate under imminent danger of serious physical injury of catching pneumonia due to the cold air coming in through the open windows. That these officers were fully aware that their above action & conduct caused this inmate to become really cold as told them such more than once, but yet they still did such & continued to do such deliberately & knowingly thereby showing deliberate indifference to this inmate's physical well-being & health & safety & his 8th Amendment U.S. Const. Art. I, Sec. 13 & 14. P. Const. Art. I, Sec. 26. Officer Valentine also did this several times because he doesn't like me. I have written to Sup. Dragovich about this on 9-25-01, how to get me back on a shift. You have a lot of nice complaining given your poor behavior and attitude.

B. List actions taken and staff you have contacted, before submitting this grievance. Attach the copy of the DC-135A with the staff member's response of your informal resolution attempt.

I tried to first informally resolve the above matters by attempting to verbally discuss such with RHU Lt. Porterfield on 9/24/00, and with Lt. Rhoades on 9/24/00, but to no avail. I discussed such with Lt. Ladd on 9/26/00, I attempted to see Mr. Spink about such, but he left the block without seeing me. I also wrote Sup. Dragovich about such on 9/25/01.

Your grievance has been received and will be processed in accordance with DC-ADM 804.

Signature of Facility Grievance Coordinator

Date

WHITE - Facility Grievance Coordinator Copy CANARY - File Copy PINK - Action Return Copy GOLDENROD - Inmate Copy

Revised
July 2000

PHOTOGRAPH EXHIBIT - C - 2

Maer vs. Dragovich, et al.,
 CIVIL NO. 1:00-CV-00-2122
CERTIFICATE OF SERVICE

I Certify that on 9-17-01, I mailed to the person listed below, a true & correct carbon copy of the within Plaintiff's written objections to the U.S. Magistrate Judge's Report and Recommendation of July 11, 2001, herein, by way of U.S. 1st Class mail, Postage Prepaid & addressed to:

MR. Michael L. Harvey, SDAG,
 OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA
 15th Floor, Strawberry Square
 Harrisburg, PA 17130

I certify that on 9-17-01, I gave the Original of the above document to prison officials here for mailing to this court.

I certify under penalty of perjury & pursuant to 28 USC that the above, is true & correct.

(S) John Richard
 MR. JOHN RICHARD JAY
 #BQ-3219
 SCI-Greene/CMU
 175 Abgess Drive
 Waynesburg, PA 15370

Plaintiff and Associate

Dated/Executed in:

17th SEPTEMBER 2001:

At: Waynesburg, Pennsylvania: